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11 UNITED STATES OF AMERICA  
12 NATIONAL LABOR RELATIONS BOARD  
13 REGION 32

14 BAKERY, CONFECTIONERY & TOBACCO  
15 WORKERS UNION, LOCAL 125,

16 Petitioner/Union,

17 and

18 BLOMMER CHOCOLATE COMPANY OF  
19 CALIFORNIA, LLC,

20 Respondent/Employer.

Case No. 32-RC-131048

**EXCEPTIONS TO THE HEARING  
OFFICER'S REPORT AND BRIEF IN  
SUPPORT OF EXCEPTIONS**

21 **I. INTRODUCTION**

22 Petitioner takes exception to the Hearing Officer's Report and Recommendations on  
23 Objections. Although Petitioner agrees that a new election is required, it disagrees to a large  
24 degree with the rationale of the Hearing Officer as well as his recommendation regarding certain  
25 objections.

26 **A. EXCEPTION NO. 1.**

27 To the failure of the Hearing Officer to find that the Excelsior List was inadequate, and  
28 therefore, based on that finding, a new election should be directed.

The Hearing Officer correctly found that a completely inaccurate Excelsior List was  
initially sent to the Union. Initially the list was totally scrambled. Eventually the Union  
eventually had a correct list 22 days before the election date. As a result, when employees were

1 contacted, the Union was necessarily undermined because the employees thought that the Union  
2 couldn't keep the names of the employees straight. This perception would necessarily weaken the  
3 Union in the eyes of the employees in the initial days of the campaign after the election was set.  
4 On this basis, the Excelsior List was more than inadequate; it was very detrimental to the Union's  
5 ability to campaign.

6 The Excelsior List was also inadequate because it did not contain email addresses, phone  
7 numbers and work shifts. The Board should recognize the applicability of the new rules to any  
8 pending objections case and direct an election based on the inadequacy of the Excelsior List.  
9 (See pp. 3-5.)

10 In any case, by the time a new election is conducted, the Board's new rules will apply, and  
11 the new Excelsior list requirement should apply.

12 **B. EXCEPTION NO. 2.**

13 To the failure of the Hearing Officer to apply the correct standard in evaluating the effect  
14 of the employer's unlawful rules. (See p. 7.)

15 The Hearing Officer used the test for determining the illegality of rules rather than  
16 whether the rules interfered with the laboratory conditions that must prevail during the critical  
17 period. Any interference with the right of the employees to campaign during the critical period  
18 before the election should be grounds for a new election. The Hearing Officer relied on cases  
19 applying the question of whether the employer maintained rules that violated Section 8(a)(1).  
20 (See p. 7 of Hearing Officer's Report.) (See fn. 5 at p. 11, where the Hearing Officer rejected any  
21 reliance upon any pending unfair labor practice.)

22 The Board applies a different standard in determining employer conduct that interferes  
23 with the laboratory conditions necessary during the critical period before the election.

24 The Board in *Jury's Boston Hotel*, 356 NLRB No. 114 (2011), held that the maintenance  
25 of three handbook rules that were unlawful "had a reasonable tendency to chill or otherwise  
26 interfere with the prounion campaign activities of employees during the election period." *Id.* at  
27 \*3. As a result, that election was set aside.

28

1 The Board noted that “none of the rules was actually enforced against employees during  
2 the election and that there is no evidence that any employees were actually deterred from  
3 engaging in campaign activity.” *Id.* Nonetheless, the Board, relying upon previous cases, held  
4 that the mere maintenance of the rules necessarily tended “to show a chilling effect on  
5 employees.” *Id.*

6 Recently, the Board upheld an objection in a case based upon “the Respondent’s  
7 maintenance of objectionable off duty access and social networking policies.” *Durham Sch.*  
8 *Servs.*, 360 NLRB No. 85 at \*1 (2014). See footnote 5. The Board did not rely upon the  
9 narrowness of the election for holding that the election should be set aside. Indeed, the larger the  
10 margin against the union, the more effective the rule or rules have been in limiting Section 7  
11 activity.

12 Even more recently, the Board ruled in *Purple Communications, Inc.*, 361 NLRB No. 43  
13 (2014). In *Purple Communications*, the Board expressly “reject[ed] the judge’s conclusion that  
14 the unlawful no-disruptions rule was insufficient, standing alone, to require new elections.” *Id.* at  
15 \*5. “The rule applied to all Corona and Long Beach employees throughout the critical period,  
16 and its extraordinary breadth could have discouraged interpreters from engaging in many types of  
17 permissible campaigning.” *Id.*

18 In summary, the current state of the law in light of *Purple Communications* is that the  
19 maintenance of one rule standing alone is enough to set aside the election.

20 These cases hold that where the rules or rule have a “tendency to chill or otherwise  
21 interfere with the pro-union campaign activity. . .” each rule interferes with the election. The  
22 Board does not require that there be a similar finding or related finding that actually interferes  
23 with Section 7 activity. It is only necessary to find that the rule or rules “could reasonably have  
24 affected the outcome of the election.” *Jury’s Boston Hotel*, 356 NLRB No. 114 at \*3.

25 The Board should clarify this by expressly noting that it is not necessary to find a  
26 violation of Section 7 but only that the employer’s conduct limits the ability of employees to  
27 engage in the kind of campaigning and pre-election activity that would support the Union. The  
28 margin of loss should not affect this since, with employer power to discipline, the larger the

margin, the more the Board should presume the unlawful conduct adversely affected employee free choice.

Moreover, *Safeway Stores*, 338 NLRB No. 63 (2011), and *Delta Brands*, 344 NLRB 252 (2005), should be expressly overruled and tossed into the trash pile of discarded doctrines.

**C. EXCEPTION NO. 3.**

The Hearing Officer used the Board's standard as expressed in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004), to determine whether the rules were bad. A challenged rule is invalid if that rule "reasonably would be interpreted by employees as prohibiting Section 7 activity." *World Color (USA) Corp.*, 360 NLRB No. 37 at 2 (2014). The Board, however, should expressly overrule *Lutheran Heritage Village-Livonia*.

The Petitioner believes, furthermore, that the Board should return to the rule established in *Lafayette Park Hotel*, 326 NLRB 824 (1998). The Board in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), imposed an unworkable and unreasonable doctrine for evaluating when employer-maintained rules are unlawful. It modified the previously existing rule expressed in *Lafayette Park Hotel*, 326 NLRB 824 (1998). See also *Ark Las Vegas Rest. Corp.*, 343 NLRB 1281, 1283 (2004) (any ambiguity in a rule that restricts concerted activity can be construed against the employer).

The Board's application of the *Lutheran Heritage Village-Livonia* rule ignores the basic concept that if some employees can read the language as interfering with Section 7 rights, then there is a violation because some employees have had their rights unlawfully interfered with or restricted. The fact that someone may be able to read the rule as not reaching Section 7 activity allows employers to chill the Section 7 rights of those who reasonably read the rule as reaching Section 7 activity. Those who read the rule as not to limit Section 7 activity may have no interest in such activity. They may assert their right to "refrain from such activity." But those who choose to engage in such activity have their conduct chilled, if not prohibited. The Board's rule is a form of tyranny of some or a few over the rights of those who want to engage in Section 7 activity. If an employer's action interferes with the Section 7 right of one employee, the conduct violates the Act. The *Lutheran Heritage Village-Livonia* rule assumes that only if many, and

1 probably a majority, would have their rights violated, does the conduct violate the Act. Such a  
2 rule should be discarded and thrown into the trash pile of discredited doctrines.

3 In *Lutheran Heritage Village-Livonia*, the Board adopted the following presumption:

4 Where, as here, the rule does not refer to Section 7 activity, we will  
5 not conclude that a reasonable employee would read the rule to  
6 apply to such activity simply because the rule *could* be interpreted  
7 that way. To take a different analytical approach would require the  
8 Board to find a violation whenever the rule could conceivably be  
read to cover Section 7 activity, even though that reading is  
unreasonable. We decline to take that approach.

9 *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

10 This doctrine has created confusion and uncertainty in the application of rules. Moreover,  
11 it is an illogical statement. If the “rule could be interpreted that way [to prohibit Section 7  
12 activity],” the rule should be unlawful. We are not suggesting that if that “reading is  
13 unreasonable,” it should violate the Act. Only if the rule can be reasonably read to interfere with  
14 Section 7 activity should it be found unlawful. This is the rule of ambiguity. If the rule is  
15 ambiguous and could reasonably be read by some to interfere with or prohibit Section 7 activity,  
16 it should be unlawful.

17 The Board’s prior rule in *Lafayette Park Hotel*, cited above, is to construe any ambiguity  
18 against the employer. This has been the consistent application in many areas of law, including  
19 the Board’s application of employer-created rules. After all, the employer has control over what  
20 it says, and it can implement language that is not vague or ambiguous. Only the employer  
21 benefits from chilling and restricting Section 7 activity.

22 A worker is not at fault if the employer makes a statement that is ambiguous and could  
23 affect or chill Section 7 rights. The employer statement should be construed against the  
24 employer. Where there is any reasonable interpretation of the rule that could interfere with  
25 Section 7 activity, the rule should be deemed unlawful. Employers will necessarily make rules  
26 ambiguous to chill such activity unless required to make them clear. Ambiguity gives them wider  
27 discretion and more power. Such ambiguities necessarily coerce some employees.

1 This interpretation has become one by which the Board ignores the illegal yet reasonable  
2 interpretation as long as there is a reasonable interpretation that is not unlawful. The Board has  
3 turned the law on its head; where there is a reasonable interpretation that the rule does not affect  
4 Section 7 rights, which only a few employees may apply, it makes no difference that most or  
5 many of the employees would apply a reasonable interpretation that the rule prohibits Section 7  
6 activity.

7 This is illustrated by the employer's position in this case. In arguing that these various  
8 rules are unlawful, the employer ignores the imprecision by which the rules themselves were  
9 drafted.

10 Put in other words, the burden should be on the drafter and maintainer of a rule to prove  
11 that "no employee," not a single one, "would reasonably construe" the rule in a way to cover or  
12 limit Section 7 activity. If any employee could reasonably construe the rule as limiting Section 7  
13 activity, it would be unlawful.

14 This is further illustrated by the Board's recent decision in *Three D, LLC d/b/a Triple Play*  
15 *Sports Bar & Grille*, 361 NLRB No. 31 (2014). The majority found the "term 'inappropriate' to  
16 be 'sufficiently imprecise' that employees would reasonably understand it to encompass  
17 'discussion and interactions protected by Section 7.'" Slip Opinion p. 7. This is almost a  
18 formulation that where there is an ambiguity in a phrase or rule it should be construed against the  
19 drafter and enforcer of the rule, namely the employer. This contradicts to some degree the later  
20 statement that "many Board decisions [] have found a rule unlawful if employees would  
21 reasonably interpret it to prohibit protected activities." Slip Opinion p. 8. The word "would"  
22 should be replaced with the word "could." This would shift the burden to the employer to clarify  
23 its rules to eliminate interference with Section 7 rights.

24 Recently, the Board has also made it clear that where language "creates an ambiguity,"  
25 that ambiguity "must be construed against the Respondent as the drafter of the [rule]." *Murphy*  
26 *Oil U.S.A., Inc.*, 361 NLRB No. 72 at \*19 (2014). The Board relied upon its prior decision in  
27 *Lafayette Park Hotel*, 326 NLRB No. 824, 828 (1998), *enforced*, 203 F.3d 52 (D.C. Cir. 1999).  
28 Here, there are patent ambiguities in the four disputed rules. The ambiguities were proven

1 because the employer witnesses couldn't interpret or explain the rules. If the employer can't  
2 explain the rules or understand them, then the employees would necessarily not be able to know  
3 whether their activity would be permitted or prohibited by the rules. Thus, there is an ambiguity  
4 created by even the employer's witnesses, which must be construed in light of *Murphy Oil* against  
5 the drafter of the rules, namely the employer.<sup>1</sup> Under these circumstances, this is the perfect case  
6 in which to overrule *Lutheran Heritage Village-Livonia*. It is particularly an appropriate case in  
7 which to overrule that doctrine because the employer couldn't explain the rules. If the employer  
8 can't explain the rules, no employee could be expected to understand what position or conduct is  
9 prohibited or permitted.

10 The *Lutheran Heritage Village-Livonia* application has allowed an interpretation of  
11 employer rules to be created from the employer perspective rather than from the view of a  
12 worker. Where the worker could read any reasonable interpretation into the rule that would  
13 prohibit Section 7 activity, it is overbroad as to that worker or a group of workers. The fact that  
14 some workers might reasonably construe it not to prohibit such Section 7 activity does not  
15 invalidate the fact that at least some employees could reasonably read the rule to prohibit Section  
16 7 activity, and thus the rule would chill those activities. Where one employee understands the  
17 rule to prohibit Section 7 protected activity, at least an interference with Section 7 activity has  
18 been created.

19 We quote at length the dissent, and we will ask this Board to return to the view of the  
20 dissent:

21 In *Lafayette Park Hotel*, *supra* at 825, the Board recognized that  
22 determining the lawfulness of an employer's work rules requires  
23 balancing competing interests. The Board thus relied upon the  
24 Supreme Court's view, as stated in *Republic Aviation v. NLRB*, 324  
25 U.S. 793, 797-798 (1945), that the inquiry involves "working out an  
26 adjustment between the undisputed right of self-organization  
27 assured to employees under the Wagner Act and the equally  
28 undisputed right of employers to maintain discipline in their  
establishments." 326 NLRB at 825. While purporting to apply the  
Board's test in *Lafayette Park Hotel*, the majority loses sight of this  
fundamental precept. Ignoring the employees' side of the balance,  
the majority concludes that the rules challenged here are lawful

<sup>1</sup> It is worth noting that these rules were adopted in 2002 and haven't been modified since then.  
Thus, the employer has made no effort to comply with current Board law.

1 solely because it finds that they are clearly intended to maintain  
2 order in the workplace and avoid employer liability. The majority's  
3 incomplete analysis belies the objective nature of the appropriate  
4 inquiry: "whether the rules would reasonably tend to chill  
5 employees in the exercise of their Section 7 rights."

6 Our colleagues properly acknowledge that even if a "rule does not  
7 explicitly restrict activity protected by Section 7," it will still violate  
8 Section 8(a)(1) if—among other, alternative possibilities—  
9 "employees would reasonably construe the language to prohibit  
10 Section 7 activity." On this point, of course, the established test  
11 does not require that the only reasonable interpretation of the rule is  
12 that it prohibits Section 7 activity. To the extent that the majority  
13 implies otherwise, it errs. Such an approach would permit Section  
14 7 rights to be chilled, as long as an employer's rule could  
15 reasonably be read as lawful. This is not how the Board applies  
16 Section 8(a)(1). See, e.g., *Double D Construction Group, Inc.*, 339  
17 NLRB 303, 304 (2003) ("The test of whether a statement is  
18 unlawful is whether the words could reasonably be construed as  
19 coercive, whether or not that is the only reasonable construction").

20 The majority asserts that it has considered the employees' side of  
21 the balance, in that it has found that the purpose behind the  
22 Respondent's rules—to maintain order and protect itself from  
23 liability—is so clear that it will be apparent to employees and thus  
24 could not reasonably be misunderstood as interfering with Section 7  
25 activity. Although the Respondent's assertedly pure motive in  
26 creating such rules may be crystal clear to our colleagues, it may  
27 not be as obvious to the Respondent's employees, especially in light  
28 of the other unlawful rules maintained by the Respondent. Rather,  
for reasons explained below, we find that the challenged rules are  
facially ambiguous. The Board construes such ambiguity against  
the promulgator. *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992),  
quoting *Paceco*, 237 NLRB 299 fn. 8 (1978).

*Id.* at 650 (footnote omitted).

#### **D. EXCEPTION NO. 4.**

To the failure of the Hearing Officer to find that the confidentiality rule is overbroad in other respects.

While the Hearing Officer found that in one respect the confidentiality rule is overbroad, he ignored the remaining over-breadth of the confidentiality rule.

The confidentiality rule prohibits disclosure of "any other papers or documents, used by the Company and made known to you by the Company . . . and learned by you while in the employment of the Company." This prohibition would include the handbook itself, which expressly states that "it is intended for your personal use and reference as an employee of the

1 Company.” (See p. 5.) Thus, the handbook, payroll statements, benefit booklets or anything else  
2 which is a company document would be prohibited from disclosure by the confidentiality rule.

3 The confidentiality rule is also overbroad for an additional reason. The confidentiality  
4 rule prohibits employees from disclosing “methods of operations.” It also prohibits the disclosure  
5 of “profitability of Blommer Chocolate Company.”

6 The methods of operations are clearly relevant to any organizing effort.

7 As evidenced in the handbook, this is a chocolate company which produces and sells  
8 chocolate to customers. The Union needs to know what the methods of the operation are, for  
9 example, to determine the appropriate unit. It needs that information for safety reasons. It needs  
10 that information in order to find out what issues are created in the workplace by the “methods of  
11 operations.” Nothing can be more fundamental to a union’s organizing efforts or to protected  
12 concerted activity of employees than to be able to talk about the methods of operations.<sup>2</sup>

13 The same, of course, is true with respect to “profitability.” Whether or not a company is  
14 profitable is extremely relevant, if not central, to the employees’ interest in better wages, hours  
15 and working conditions. To the extent that they know or believe the company is profitable (they  
16 don’t have to have specific knowledge), they are entitled to organize to seek better wages, hours  
17 and working conditions. They can organize around the profitability issue; this prohibitory  
18 language interferes with that basic right. If the employer doesn’t want employees to have specific  
19 financial data, they can simply keep it away from the employees. Otherwise, employees should  
20 be free to disclose such data.

21 We recognize that the employer has the right to prohibit disclosure of proprietary or secret  
22 information regarding company operations. The rule is not as limited as it could have been. The  
23 failure to limit it is illustrated by the Employer’s inability to describe what is covered or not  
24 covered by the confidentiality rule. That ambiguity, as we noted above, must be construed  
25 against the Employer.

26 The breadth of the confidentiality rule is demonstrated by the last sentence, which states:  
27 “You will not disclose or make known to any of them or anything related to them to any person,

28 <sup>2</sup> To the extent there is a proprietary recipe, the employer could make that plain.

1 firm or corporation.” Furthermore, the rule encompasses “everything which the employee  
2 acquires by virtue of his employment . . . belongs to the employer, whether acquired lawfully or  
3 unlawfully, or during or after the expiration of the term of his or her employment.” (Handbook at  
4 p. 19.)

5 The sweeping breadth of the rule renders it unlawful for the reasons discussed above. The  
6 Hearing Officer failed to acknowledge or rule on these contentions.

7 **E. EXCEPTION NO 5.**

8 The no solicitation rule is overbroad because no employee can reasonably understand  
9 what is meant by the employer’s prohibition against solicitation.

10 As recently illustrated by the Board’s decision in *Conagra Foods, Inc.*, 361 NLRB No.  
11 113 (2014), the Board adopted a limited meaning of the word “solicitation.” A lawful solicitation  
12 rule may only limit employees from asking for money and signatures during work time. Merely  
13 talking about supporting unions during work time or asking employees to come to a later meeting  
14 is not solicitation. The Board held that solicitation has this narrower meaning. The fact that  
15 employers can take the broad approach to what is solicitation to severely limit employees  
16 illustrates the ambiguity of the word so long as the employer doesn’t expressly explain that  
17 solicitation is limited to actually asking someone to sign a card or to stop work to pay dues or  
18 something of a similar nature which interferes with work. Merely asking people to support a  
19 union during work time is lawful campaign activity and protected by Section 7.

20 Wherever an employer uses the broad term “solicitation” to define prohibited activity, the  
21 employer is necessarily taking advantage of the ambiguity of the word “solicitation” as that word  
22 has been understood by management and as asserted by management in *Conagra*.<sup>3</sup> This has a  
23 chilling effect on employees’ rights, and the use of the word in this rule should be unlawful.

24 **F. EXCEPTION NO. 6.**

25 To the failure of the Hearing Officer to find that employees have the right to use and  
26 parody the company’s name and logo.

27 <sup>3</sup> Conagra has sought review, and this again confirms that employers construe the word  
28 differently than the Board. It is necessarily coercive to use an ambiguous word, the meaning of  
which is not settled or known to workers.

1 First, the Hearing Officer failed to recognize that the rules prohibit even the use of the  
2 company “name.” Thus, an employee couldn’t explain to an outsider or union person that he  
3 works for this employer. To merely mention the company’s name would violate the rule. To put  
4 the company’s name on literature, or otherwise just reference a company’s name, is prohibited.  
5 The rule is thus overbroad and interferes with the right of employees to campaign during a pre-  
6 election period.

7 The same is true for the logo. Employees have the right to use the logo to refer to their  
8 employer and, more importantly, to parody it. Under trademark law, a parody is permissible.<sup>4</sup>  
9 Thus, under federal law, the use of the logo is permitted and protected so long as it is a parody or  
10 otherwise critical. The Hearing Officer failed to recognize that federal trademark law allows the  
11 use of the logo and name. Thus the prohibition against the use of the logo interfered with the  
12 employees’ rights during the pre-election period.

13 **G. EXCEPTION NO. 7.**

14 The Hearing Officer failed to recognize that employees have a right to express their  
15 personal opinions during work time.

16 The Hearing Officer followed the Board’s decision in *Purple Communications, Inc.*,  
17 *supra*. That decision does not stand for the proposition in any respect that employees are  
18 prohibited from using a computer or phone or other communications device during work time.  
19 Indeed, as is even cited by the dissent in *Purple Communications*, there are many circumstances  
20 where employees use the email system during work time for work-related issues. See dissent of  
21 Member Miscimarra at fn. 37 and dissent of Member Johnson at fn. 55-57. Indeed, there are  
22 many cases where employees have used company communications systems during work time to  
23 express personal opinions. They can do so as long as it doesn’t interfere with production. Thus,

24  
25 <sup>4</sup> Use of the trademark or logo in a parody, so long as the employee is not using it for commercial  
26 purposes, is not unlawful under trademark law. *L.L. Bean, Inc. v. Drake Publishers, Inc.*, 811  
27 F.2d 26, 29 (1st Cir. 1987); *Cliffs Notes v. Bantam Doubleday Dell Publ’g Group*, 886 F.2d  
28 490, 494-495 (2d Cir. 1989); *Mattel, Inc. v. MCA Records*, 296 F.3d 894, 900 (9th Cir. 2002);  
*Yankee Publ’g, Inc. v. News Am. Publ’g, Inc.*, 809 F.Supp. 267 (S.D.N.Y. 1992) (all rejected  
trademark claims where the use is a parody). Any lawsuit would be preempted since the use of  
the logo would be part of labor speech. *Linn v. Plant Guard Workers*, 383 U.S. 53, 65-66  
(1966).

1 the rule interferes with the right of employees to campaign and indeed their Section 7 rights even  
2 during work time.

3 **H. EXCEPTION NO. 8.**

4 The Hearing Officer failed to recognize that *Register-Guard* was overruled in its entirety.  
5 Although the Board stated that it was not overruling the discrimination test adopted in *Register*  
6 *Guard*, see fn. 3 of *Purple Communications*, it effectively did so. Here the rule against  
7 expressing personal opinions is discriminatory on its face and violates Section 8(a)(3). This rule  
8 is unlawful.

9 *Register-Guard* should, however, be overruled. The *Register-Guard* Board, confronting  
10 the same question presented here, rejected the applicability of *Republic Aviation Corp. v. NLRB*,  
11 324 U.S. 793 (1945), to employee use of a company email system for Section 7-protected  
12 solicitation on the ground that “[a]n employer has a ‘basic property right’ to ‘regulate and restrict  
13 employee use of company property.’” *Register-Guard*, 351 NLRB 1110, 1114 (2007) (quoting  
14 *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663-64 (6th Cir. 1983)). While an employer may  
15 exclude employees completely from using a company email system for non-work  
16 communications, once it permits employees to use that system for work purposes, “it is the  
17 employer’s *management* interests rather than its property interests that primarily are implicated.”  
18 *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 (1978) (emphasis added). At that point, *Republic*  
19 *Aviation* – with its focus on the right of employees “effectively to communicate with one another  
20 regarding self-organization on the jobsite,” *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 505 (1978)  
21 – fully applies.

22 The cases relied upon by the *Register-Guard* Board for its conclusion that employees have  
23 “no statutory right” to use “employer-owned property – such as bulletin boards, telephones, and  
24 televisions – for Section 7 communications,” 351 NLRB at 1114, follow the rule set forth in  
25 *Eastex*. As those cases make clear:

26 “When an employer singles out union activity as its only restriction on the private use of  
27 company [property], it is not acting to preserve the use of the [property] for company business. It  
28

1 is interfering with union activity, and such interference constitutes a violation of Section 8(a)(1)  
2 of the Act.” *Churchill’s Supermarkets, Inc.*, 285 NLRB 138, 156 (1987).

3 In *Hitachi Capital America Corp.*, 361 NLRB No. 19 (2014), an employee used the  
4 electronic communications systems to communicate on working conditions during work time and  
5 was discharged. Even Member Miscimarra noted in footnote 3 of his dissent that the  
6 discriminatee could have used the email to respond with respect to working conditions. He also  
7 concurs that the emails were protected concerted activity. See fn. 7. This is just a very recent  
8 example. See also, *Cal. Inst. of Tech.*, 360 NLRB No. 63 (2014); *Timekeeping Sys. Inc.*, 323  
9 NLRB 244 (1997); and *Food Servs. of Am.*, 360 NLRB No. 123 (2014).

10 Contrary to the conclusion drawn by the *Register-Guard* Board, the cases cited in that  
11 decision actually demonstrate that the Board has applied *Republic Aviation’s* interference analytic  
12 framework to employee use of a wide range of employer equipment for Section 7-protected  
13 communications, including bulletin boards, telephones, and photocopy machines. See *Eaton*  
14 *Techs., Inc.*, 322 NLRB 848, 853 (1997) (“[W]hen an employer permits . . . employees . . . to post  
15 personal . . . notices on its bulletin boards, the employees’ . . . right to use the bulletin boards  
16 receives the protection of the Act . . .” (quoting *Container Corp. of Am.*, 244 NLRB 318 fn.2  
17 (1979))); *Union Carbide Corp.*, 259 NLRB 974, 980 (1981) (“[O]nce [the employer] grants the  
18 employees the privilege of occasional personal use of the telephone during worktime, . . . it could  
19 not lawfully exclude the Union as a subject of discussion . . .”); see also *Churchill’s*  
20 *Supermarkets*, 285 NLRB at 155-56 (1987); *Champion Int’l Corp.*, 303 NLRB 102, 109 (1991)  
21 (“An employer may not invoke rules designed to protect its property from unwarranted use in  
22 furtherance of prounion activities while, at the same time, freely permit such use for non business  
23 related reasons.”). Based on this precedent, the Board should apply *Republic Aviation’s* analytic  
24 framework to employee use of a company email system for Section 7-protected communications  
25 as well. Thus, in *Register-Guard*, Suzi Prozanski’s May 4 email was protected because the  
26 employer’s discipline interfered with her Section 7 right to communicate about workplace issues.  
27 351 NLRB at 1112. Here, the rule is invalid as an interference with the Section 7 rights of  
28

1 employees who have access to Bloomer's electronic communications systems. For these reasons,  
2 *Register-Guard* should be overruled insofar it applies an improper discrimination test.

3 **I. EXCEPTION NO. 9.**

4 The Hearing Officer failed to recognize that the maintenance of rules that are ambiguous  
5 should be grounds to set aside an election irrespective of whether they violate Section 8(a)(1).

6 Here, any one of these rules would have interfered with the employee's pre-election  
7 campaign activity. The Board has made it clear that the maintenance of any one rule that  
8 interferes with campaign activity interferes with the laboratory conditions and is grounds to set  
9 aside an election. See *Jury's Boston Hotel, supra*, and *Durham School Services, supra*.

10 **II. CONCLUSION**

11 For the reasons suggested above, these Exceptions should be granted. The election should  
12 be set aside and a new election directed based on these additional grounds.

13  
14 Dated: February 18, 2015

WEINBERG, ROGER & ROSENFELD  
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15  
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Bakery, Confectionery & Tobacco Workers  
Union, Local 125

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20 136563/797692

**PROOF OF SERVICE  
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On February 18, 2015, I served the following documents in the manner described below:

**EXCEPTIONS TO THE HEARING OFFICER'S REPORT AND  
BRIEF IN SUPPORT OF EXCEPTIONS**

- ☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- ☐ (BY FACSIMILE) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be transmitted by facsimile and I caused such document(s) on this date to be transmitted by facsimile to the offices of addressee(s) at the numbers listed below.
- £ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kshaw@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Scott Gore Mr. Jeremy L. Edelson Ms. Penny Kukulski Laner Muchin, Ltd. 515 North State Street, Suite 2800 Chicago, IL 60654 sgore@lanermuchin.com jedelson@lanermuchin.com pkukulski@lanermuchin.com	Mr. George Velastegui National Labor Relations Board, Region 32 NLRB Regional Director 1301 Clay Street, Room 300N Oakland, CA 94612 George.velastegui@nrlrb.gov
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on February 18, 2015, at Alameda, California.

/s/ Katrina Shaw  
\_\_\_\_\_  
Katrina Shaw